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IN THE

Supreme Court of the United States

October Term, 1995

NATIONWIDE MUTUAL INSURANCE COMPANY
and
NATIONWIDE MUTUAL FIRE
INSURANCE COMPANY,

Petitioners,

v.

HENRY CISNEROS, Secretary of the United States Department of Housing & Urban Development; JERALD L. STEED, Executive Director, Dayton Human Relations Council; CHARLES W. BROWN, Chairperson, Dayton Human Relations Council; and CITY OF DAYTON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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National Association of Independent Insurers ("NAII") respectfully moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae* in support of the petition of Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company ("Nationwide") for Writ of Certiorari. Petitioners and the Office of the Solicitor General, on behalf of respondent Henry Cisneros, have consented to the filing of this brief. This motion is necessitated because counsel for respondents Jerald

L. Steed, Charles W. Brown and the City of Dayton have refused written consent.[1]

NAII is a national insurance trade association representing over 550 property and casualty insurance companies across the country. NAII is headquartered in Des Plaines, Illinois, maintains two regional offices and a Washington, D.C. office, and retains legislative counsel in nearly every state. NAII member companies are domiciled in 48 states and conduct business in all 50 states, the District of Columbia and various foreign jurisdictions.

The NAII membership reflects a broad cross-section of the property and casualty insurance industry. NAII member companies range in size from large national companies to regional companies to companies writing in a single state. Over one third of the nation's top 50 insurers are NAII members. In 1994, NAII member insurers together wrote over $65 billion in direct property and casualty premiums which represented over 26% of all property and casualty insurance underwritten in the United States.

On a national basis, 154 NAII member companies wrote homeowners insurance in 1994 for a total of over $7.4 billion in direct premiums or nearly 31% of the national homeowners insurance market. The number of NAII member companies writing homeowners insurance increased over 40% during the years 1988 to 1993 and the number of such companies continues to climb. Currently, over 280 NAII member companies (over 50% of all NAII members) write homeowners insurance.

As a national insurance trade association, NAII seeks to promote the economic, legislative and public standing of the

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1. Although the above-referenced respondents have refused to provide such consent to NAII, it is NAII's understanding that these respondents recently have informed this Court by letter, dated December 29, 1995, that they "do not object to the filing of an amicus brief in this matter."

insurance industry; to provide a forum for discussion of problems which are of common concern to its members; to keep members informed of regulatory and legislative developments; and to serve the public interest through appropriate activities, including the promotion of safety and security of persons and property.

Because it can draw on the collective knowledge of its broad-based membership, NAII has the unique ability to serve as a source of a wealth of objective, specialized information concerning the complex economic structure of the insurance business. NAII collects information concerning various aspects of the insurance business and distributes that information to various entities, including insurance companies, state insurance departments and government agencies. Indeed, NAII is a state-authorized statistical reporting agency. Among other things, NAII's data compilations reflect the loss experience of a major segment of the insurance industry.

NAII and its members have a substantial interest in the issues raised by the lower court's decision in *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351 (6th Cir. 1995). As detailed more fully in the attached memorandum, that court's decision that property and hazard insurance practices are governed by the Fair Housing Act ("FHA") will have a profound effect on NAII members and the property and casualty insurance industry in general.

The continuing uncertainty as to whether the FHA applies to insurance practices has created an enormous dilemma for the entire property and casualty insurance industry. Insurers must choose between attempting to reconfigure their business in a manner consistent with the Department of Housing and Urban Development's regulatory structure, an approach likely to substantially change their businesses in ways that may be inconsistent with basic financial soundness considerations and the existing state

regulatory structure, or leaving themselves vulnerable to prohibitively costly government investigations and enforcement actions and/or private litigation brought under the FHA. Indeed, several NAII member companies already have become the target of federal investigations and/or civil actions, including class actions, pursuant to the FHA. Thus, a proper resolution of the conflict among the circuits regarding whether the FHA applies to insurers will provide much needed guidance for NAII and its members.

Because of the distinct perspective NAII can offer in connection with these issues based on its specialized knowledge of the insurance industry, and because of NAII's strong interest in these issues and their effect on its members, NAII respectfully moves for leave to submit the attached brief to assist the Court in its determination whether to grant further review.

Respectfully submitted,

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

The interest of the *amicus curiae* is set forth in the motion accompanying this brief.

INTRODUCTION

The central issue raised by the decision below is whether the Department of Housing and Urban Development ("HUD") may establish by regulatory fiat that the Fair Housing Act, 42 U.S.C. § 3601, *et seq.* (the "FHA" or "Act") applies to the property and hazard insurance business.[1] This issue is clearly and unequivocally ripe for review by this Court. The Sixth Circuit's split panel decision permitting HUD to regulate the business of property and hazard insurance under the FHA[2] has perpetuated a decade of conflict among the Courts of Appeal as to whether Congress, which enacted the FHA in 1968 and subsequently declined on at least four separate occasions to expand the Act's reach to property insurance, intended to permit HUD to redefine the Act's scope to reach insurance practices.

The prompt and final resolution of the issue is one of substantial importance to the property insurance industry and to the millions of American homeowners who purchase property insurance. Absent clear direction from this Court,

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1. Because HUD and some courts have consistently included the term "hazard insurance" in describing the types of insurance purportedly covered by the FHA, NAII uses the term in this brief where necessary to avoid confusion. The term "hazard insurance," however, is not commonly used by the insurance industry. The terms more commonly used to describe the types of insurance provided to homeowners in multiperil homeowners policies are "property and casualty" insurance, and the large group of insurers who provide such insurance are part of the "property and casualty" insurance industry.

2. *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351 (6th Cir. 1995), App. 1. References to the Appendix filed by Petitioners are abbreviated herein as "App.". References to the Joint Appendix filed by the parties with the Court of Appeals are abbreviated herein as "JA".

the property insurance industry will confront continued uncertainty as to whether the law requires that it abandon the state sanctioned risk-based underwriting system that is currently used in order to acquiesce to HUD's aggressive use of the FHA to establish a new layer of federal regulations intended to advance HUD's social policy agenda. Hence the issue presented raises a public policy dilemma this Court is uniquely positioned to address—the conflict between the long-standing policy in favor of state regulation of insurance to ensure a fair and equitable risk-based underwriting and pricing system that promotes financial soundness on the one hand and HUD's interest in expansive regulation of market practices to achieve social policy objectives on the other.

For these reasons, NAII, on behalf of its over 550 property and casualty insurance company members, respectfully requests that the Court grant the Petition of Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company ("Nationwide") for Writ of Certiorari.

BACKGROUND OF THE ACTION

Congress enacted the Fair Housing Act in 1968 to "eliminate discriminatory practices of property owners, real estate brokers, builders and home financers." *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 423 (4th Cir. 1984) (citing Sen. Mondale, the Act's sponsor (Cong. Rec. S. 2272-2284) (daily ed. Feb. 6, 1968)). In accord with these purposes, Section 3604(a) and (b) of the FHA state that it shall be unlawful:

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

42 U.S.C.A. § 3604(a) and (b) (West 1994).[3] In its original version, section 3605 specifically prohibited discrimination in the financing of housing.[4] Notwithstanding the fact that section 3605 has since undergone substantial amendment to increase the scope of its coverage to include certain specifically identified "real estate-related transactions,"[5] neither it nor any other section of the FHA has ever contained a single reference to property or hazard insurance.

Since 1968, however, HUD, which is charged with administering the Act, has repeatedly ignored the will of Congress and sought to establish by regulatory fiat the applicability of the FHA to the business of property insurance. HUD's efforts to expand the reach of the FHA beyond the intent of Congress began in 1978 when HUD issued a memorandum opining that the FHA applies to property and hazard insurance, thus deeming itself to have regulatory jurisdiction over such matters.[6] However, in 1984, the Fourth Circuit categorically rejected HUD's interpretation and held that Congress did not intend that the FHA apply to property and hazard insurance. *Mackey*, 724 F.2d at 424. The Fourth Circuit stated that "the legislative history [of the FHA]

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3. Sections 3604(a) and (b) have not been materially modified since their enactment, except for the addition of "familial status" as a prohibited basis of discrimination. *Id.* (as amended in 1988).

4. Fair Housing Act, Pub. L. No. 90-284, § 805, 82 Stat. 73 (1968) (current version at 42 U.S.C. § 3605).

5. Fair Housing Amendments Act of 1988, Pub. L. 100-430, § 805, 102 Stat. 1622 (1988) (current version at 42 U.S.C. § 3605).

6. *See* Mem. to C. McGuire, HUD Asst. Sec. for Equal Opportunity from R. Prokop, General Counsel of HUD, dated August 25, 1978, JA 372-375.

contains no discussion of a barrier to fair housing created by the insurance industry." *Id.* at 423.

Consistent with the *Mackey* decision, Congress has rejected numerous attempts by HUD allies to amend the FHA to bring insurance activities within its scope. For example, Congress, while amending section 3605 of the Act in 1988 to include businesses that engage in certain real-estate related transactions, such as appraisal and secondary market activities, rejected an amendment that also would have included property and hazard insurance.[7]

Undaunted by its failure to reverse the will of Congress, HUD determined to pursue its goal by regulatory fiat. It issued regulations in 1989 granting itself the authority it was not able to secure from Congress to regulate the business of insurance under the FHA. HUD construed section 3604 to include, among other things, "[r]efusing to provide...property or hazard insurance for dwellings or providing such...insurance differently because of race, color, religion, sex, handicap, familial status, or national origin." 24 C.F.R. § 100.70(d)(4) (1995) (referred to herein as "the 1989 Regulation"). Based upon this self-proclaimed and unwarranted expansion of authority under the FHA, HUD has initiated an aggressive FHA enforcement effort directed at insurers.

In the decision below, the Sixth Circuit, in a 2-1 split, deferred to HUD's view that the FHA applies to property and hazard insurance based on the mistaken view that this Court's analysis set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (hereinafter the "*Chevron* analysis") required such a result. *Nationwide Mut.*

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7. *Compare* H.R. 1158, 100th Cong., 1st Sess. (1987) and S. 558, 100th Cong., 1st Sess. (1987) with Fair Housing Amendments Act of 1988, Pub. L. 100-430, § 805, 102 Stat. 1622 (1988) (current version at 42 U.S.C. § 3605); *see also* H.R. Rep. No. 711, 100th Cong., 2d Sess. 12 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173.

Ins. Co. v. Cisneros, 52 F.3d 1351, 1356-59 (6th Cir. 1995), App. 8-15.[8] The dissenting opinion adopted the view of the Fourth Circuit in *Mackey* that Congress' intent was that the FHA does not apply to insurance. On this basis it found that the *Chevron* analysis did not apply. *See Nationwide*, 52 F.3d at 1364, App. 29 (Kennedy, J., dissenting). Thus, the Sixth Circuit's split decision deepened the conflict among the Courts of Appeal on this issue, perpetuating continuing confusion as to whether Congress' clear legislative intent to continue to recognize the principal of state regulation of insurance or HUD's overbroad interpretation of the FHA is controlling.[9]

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8. In so doing, the Sixth Circuit majority relied substantially on the Seventh Circuit's decision in *N.A.A.C.P. v. American Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2335 (1993), which reached the same conclusion.

9. This *amicus* memorandum focuses primarily on the necessity for this Court to resolve the conflict among the circuits concerning whether Congress intended the FHA to apply to property insurance. NAII, however, fully supports those arguments stated by Petitioners and other *amici* in requesting this Court to review whether a disparate impact enforcement of the FHA is preempted by the McCarran-Ferguson Act as well as the Sixth Circuit's holding that the McCarran-Ferguson Act does not otherwise preempt the application of the FHA to insurance practices.

REASONS FOR GRANTING WRIT

I. THE DECISION BELOW HAS PERPETUATED A CONFLICT AMONG THE CIRCUITS REGARDING THE APPLICATION OF THE FHA TO INSURANCE PRACTICES.

In reaching its decision, the court below rejected the Fourth Circuit's well-reasoned analysis in *Mackey* that Congress did not intend the FHA to apply to insurance activities. In contrast, both the majority below and the Seventh Circuit in *American Family* applied a *Chevron* analysis in concluding that the 1989 Regulation is a reasonable construction of the FHA. *Nationwide*, 52 F.3d at 1356-60, App. 8-19; *N.A.A.C.P. v. American Family Mut. Ins. Co.*, 978 F.2d 287, 297-301 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2335 (1993).

This Court has clearly stated, however, that the *Chevron* analysis regarding deference to an agency does not apply where, as here, the issue of Congressional intent involves a "pure question of statutory construction" and the Court can ascertain such intent by "employing traditional tools of statutory construction." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987); *see also Nationwide*, 52 F.3d at 1364, App. 29 (Kennedy, J., dissenting). Thus, there exists a clear conflict among the Circuits (and within the panel below) concerning whether Congress has expressed an intent that the property insurance industry not be subject to an additional layer of federal regulation under the FHA.[10]

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10. *Compare Mackey*, 724 F.2d at 424 (concluding that "the [FHA] as enacted in 1968 was not intended to reach the hazard insurance industry") with *American Family*, 978 F.2d at 298 ("Congress created ambiguity" in the FHA). *Compare also Nationwide*, 52 F.3d at 1359, App. 15 (majority) ("plaintiffs have failed to show any evidence of Congressional intent to preclude the application of the [FHA] to insurance underwriting practices") with *Nationwide*, 52 F.3d at 1364, App. 29 (Kennedy, J., dissenting) (finding that *Chevron* analysis unnecessary where "this Court

II. THIS CASE PRESENTS AN OPPORTUNITY TO ADDRESS THE CONFLICT AMONG THE CIRCUITS REGARDING HUD'S IMPROPER EFFORT TO EXPAND THE FHA'S SCOPE IN CONTRAVENTION OF CLEAR CONGRESSIONAL INTENT.

The conflict among the Courts of Appeal discussed above reflects the dramatically divergent views of Congress and HUD regarding the scope of the FHA. Only by disregarding the legislative context in which the FHA was enacted, relevant subsequent legislation, and other federal legislation defining a limited federal role in the regulation of insurance did the split panel of the court below find that Nationwide "failed to show any evidence of Congressional intent to preclude the application of the Fair Housing Act to insurance underwriting practices." *Nationwide*, 52 F.3d at 1359, App. 15. Without action by this Court reversing this plainly incorrect finding, the property insurance industry will continue to be subject to HUD's improper exercise of regulatory authority under the FHA and to inherently inconsistent federal and state regulatory schemes.

A. The Plain Language Of FHA Sections 3604 And 3605 Taken Together Establishes That Congress Did Not Intend To Include Insurance Activities Within The Act's Scope.

It is undisputed that the FHA does not specifically include property or hazard insurance within its ambit. Moreover, as the *Mackey* court held, the fact that section 3604(a) makes it unlawful to refuse to sell, rent or "otherwise make unavailable a dwelling" on a discriminatory basis does

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can ascertain Congressional intent through traditional tools of statutory construction" and that Congress did not intend FHA to apply to property insurance practices) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)).

not render Congress' intent ambiguous as to whether property insurance activities are included within the scope of section 3604. *Mackey*, 724 F.2d at 423.[11] Section 3604 must be read in conjunction with section 3605, which as originally enacted, limited the FHA's scope with respect to activities which only indirectly affect the availability of housing to mortgage financing. *Id.* Thus, the Sixth Circuit's interpretation of section 3604 to include property insurance practices reads section 3605 out of the Act. As stated by the Fourth Circuit in *Mackey*, "if § 804 [3604] was designed to reach every discriminatory act that might conceivably affect the availability of housing, § 805's [3605's] specific prohibition of discrimination in the provision of financing would have been superfluous." *Id.*

As the dissent in the lower court recognized, the clear merit of the *Mackey* holding was reinforced when Congress more directly addressed the scope of the FHA with respect to "real estate-related transactions" in its 1988 amendments to the FHA and, in doing so, reiterated its intent that property insurance not be included within the Act's scope. *Nationwide*, 52 F.3d at 1364, App. 29 (Kennedy, J., dissenting); *see* 42 U.S.C.A. § 3605 (West 1994) (historical and statutory notes). Such transactions are now clearly

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11. Although the *American Family* court and the court below made brief references to an argument that the term "service" in section 3604(b) is undefined and that property insurance could be interpreted to constitute a "service" rendered in connection with the sale or rental of a dwelling under section 3604(b), both the Sixth and Seventh Circuits based their decisions that the FHA is applicable to property insurance primarily on section 3604(a)'s prohibition against "otherwise mak[ing] unavailable a dwelling." *See Nationwide*, 52 F.3d at 1356-60, App. 6-19; *American Family*, 978 F.2d at 297-301. In any event, property or hazard insurance does not constitute a "service" provided in connection with a dwelling. As the *Mackey* court noted, any contention otherwise requires a "strained interpretation of the word." *Mackey*, 724 F.2d at 424 ("what the [hazard] insurance industry does cannot reasonably be described as the provision of a service in connection with dwellings").

limited to "[t]he making or purchasing of loans or providing other financial assistance" and "[t]he selling, brokering or appraising of residential real property." 42 U.S.C.A. § 3605(b) (West 1994).

B. The Legislative History Of The FHA And Its Amendments Further Support The Conclusion That Congress Did Not Intend To Include Insurance Practices Within The Act's Scope.

As the *Mackey* court noted, "the legislative history [of the FHA] contains no discussion of a barrier to fair housing created by the insurance industry." *Mackey*, 724 F.2d at 423 (noting that the bill's sponsor stated only that the FHA "was necessary to eliminate discriminatory practices of property owners, real estate brokers, builders and home financers."). Indeed, the only reference to property insurance during the debate of the Act was the unopposed assertion that the FHA does *not* apply to "title insurance or fire, casualty and other insurance." 114 Cong. Rec. 9603 (1968).

The court below treated the lack of statutory language or of debate indicating any congressional intention to include insurance practices as insignificant and gave short shrift to the legislative context in which the FHA was passed. *Nationwide*, 52 F.3d at 1358-59, App. 13-14. However, the failure of Congress to debate the FHA's application to insurance is particularly telling in light of the fact that Congress has legislated and steadfastly adhered to a strong public policy preference in favor of state regulation of the insurance business.[12] In this context, it strains credulity to assert that Congress intended to so profoundly affect the insurance industry in enacting the FHA without so much as a

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12. *See* McCarran-Ferguson Act, § 2(b), 15 U.S.C.A. § 1012(b) (1945) (precluding constructions of federal law which would "invalidate, impair, or supersede" state insurance regulation, unless the federal law "specifically relates to the business of insurance").

reference to the McCarran-Ferguson Act and the policy in favor of state regulation of insurance. *See Nationwide*, 52 F.3d at 1364, App. 29 (Kennedy, J., dissenting) ("I do not believe that Congress would have intended to include insurance practices without at least considering the limitations imposed by the McCarran-Ferguson Act").

Indeed, when Congress enacted the FHA it "was not unaware of the problem of the unavailability of hazard insurance in some urban areas." *Mackey*, 724 F.2d at 424. Rather than addressing the issue in the FHA, Congress instead chose to address it through the Urban Property Protection and Reinsurance Act of 1968 ("UPPRA"), which created incentives for states to adopt plans to provide insurance coverage for troubled urban areas ("FAIR plans"). Urban Property Protection and Reinsurance Act, 12 U.S.C.A. § 1749bbb, *et seq.* (West 1989 & Supp. 1995). The legislative history of UPPRA demonstrates that the same Congress that passed the FHA took specific note of the McCarran-Ferguson implications when it intended to pass legislation affecting the business of insurance. There, Congress made clear that UPPRA "is not designed to replace or alter the existing structure of the insurance industry or its regulation by the individual States."[13]

The legislative history accompanying later amendments to the FHA has served only to reinforce that Congress did not intend that the Act be applied to insurance. Since its original enactment, Congress has rejected at least four attempts to amend the FHA to permit federal regulation of insurance practices.[14] For example, after HUD's General Counsel

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13. H.R. Rep. No. 1585, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 2873, 2957.

14. *See, e.g.*, H.R. 3504, 95th Cong., 2d Sess. (1978); S. 506, 96th Cong., 1st Sess. (1979); H.R. 5200, 96th Cong., 2d Sess. (1980); 126 Cong. Rec. 32,989 (1980); S. 1220, 98th Cong., 1st Sess. (1983); H.R. 3482, 98th Cong., 1st Sess. (1983); S. 2040, 99th Cong., 2d Sess. (1986); H.R. 4119, 99th Cong., 2d Sess. (1986); H.R. 1158, 100th Cong., 1st Sess.

issued a 1978 memorandum opining that the FHA applied to property insurance activities,[15] the Senate rejected an amendment which sought to make the FHA applicable to property insurers. Indeed, Senator Howard Heflin noted:

> I am aware that HUD has proposed regulations under title VIII that would cover the business of insurance—a business the Senate has decided should not be addressed by this legislation. I hope it is clear from these proceedings that HUD should not attempt to achieve by regulation what the Senate has declined to do, namely, to amend title VIII to cover the business of insurance.

126 Cong. Rec. 32,991 (1980).

As discussed above, through the vehicle of the 1988 FHA amendments, Congress dealt the final legislative blow to any interpretation of the FHA which includes property insurance within its scope. Four years after *Mackey*, Congress once again rejected an amendment that would have brought insurance activities within the scope of the Act.[16] However, Congress concurrently amended section 3605 of the Act to include other real-estate related transactions, such as appraisals and loan purchases by the secondary market, within its scope. *See generally* H.R. Rep. No. 711, 100th Cong., 2d Sess., *reprinted in* 1988 U.S.C.C.A.N. 2173.

The lower court asserts that the 1988 FHA amendments support its finding that there is no evidence of congressional intent not to include property insurance within the ambit of the FHA because "Congress gave HUD the authority to

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(1987); H.R. Rep. No. 711, 100th Cong., 2d Sess. 12 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173; *see also* 141 Cong. Rec. S14,361 (daily ed. Sept. 27, 1995) (citing letter from Congressman Dingell to HUD Secretary Cisneros, dated Nov. 3, 1994, referencing four rejected attempts to amend FHA to include insurance).

15. Mem. to C. McGuire, HUD Asst. Sec. for Equal Opportunity from R. Prokop, General Counsel of HUD, dated August 25, 1978, JA 372-75.

16. *See supra*, n. 7.

promulgate regulations knowing that HUD had consistently interpreted the Act as governing insurance underwriting practices." *Nationwide*, 52 F.3d at 1359, App. 15. Far from approving of HUD's interpretation that the FHA applies to insurers, however, Congress again rejected an amendment that adopted such an interpretation knowing that the *Mackey* court had held that insurance was not included in the Act.

The language of the FHA, the legislative context in which it was enacted and the subsequent legislation and its related legislative history demonstrate conclusively that Congress does not intend the Act to be used to regulate the business of property insurance. Accordingly, it is uniquely appropriate that this Court resolve the split among the Courts of Appeal, and in the panel below, concerning whether HUD may properly use the FHA to create for itself a regulatory role over the property insurance business.

III. THE DECISION BELOW RAISES ISSUES OF SUBSTANTIAL IMPORTANCE TO THE INSURANCE INDUSTRY AND ITS CONSUMERS.

The property insurance industry is comprised of over 1,100 companies that wrote approximately $30 billion in direct homeowners multiperil and/or fire insurance premiums in the United States in 1994[17] as well as thousands of other related small businesses and individuals, including insurance agents, brokers, claims adjusting firms, actuarial firms and rating services.[18] Purchasers of property insurance include the residents of the estimated 75.8 million insured housing units in the country.[19] Without instruction from the Court concerning whether the FHA can be used by HUD and others to impose an additional layer of regulation on the property and hazard insurance industry, the industry will be faced with continuing uncertainty regarding the source and scope of its legal obligations and millions of insurance consumers will be required to absorb the significant economic costs of such regulatory uncertainty.

The property insurance industry is unique. Unlike most product or service providers, insurers must set their prices without full knowledge of their product's cost and must

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17. Best DataBase Services: P/C Experience By State (By Line), A.M. Best Company, Inc. (1995). Homeownership multiperil policies accounted for approximately $24.2 billion of this amount. *Id.*

18. HUD has solicited comments concerning the "[e]ntities and individuals who should be covered by the [FHA] . . . such as mutual and stock companies, independent agents, direct writers, exclusive agents, and rating services." *See* Discrimination in Property Insurance Under the Fair Housing Act, Advance Notice of Proposed Rulemaking, 59 Fed. Reg. 41995, 41996 (1994).

19. This estimate is based on an extrapolation of data collected by NAII from its subscriber companies, which account for approximately 39% of the relevant market.

project future costs by analyzing loss experience data.[20] This analysis results in the classification of like risks based on a number of objective variables, including among many others the condition and use of the property insured, the loss experience for similar properties and exposure to environmental hazards.[21] In pricing a product, an insurer determines its risk by assessing average losses for the type of property being insured.[22] Similarly, insurers develop and use underwriting standards based on loss experience to categorize, accept and reject individual risks for particular property types.[23] This pricing and underwriting structure has been developed over a number of years by the insurance industry and state regulators consistent with state law regarding financially sound business practices *and* fair (non-discriminatory) trade practices.[24]

This carefully developed insurance underwriting and pricing system, which is heavily regulated by state insurance commissions, would need to be abandoned to meet the FHA requirements as interpreted by HUD. Specifically, HUD has taken the position that the disparate impact legal doctrine developed in Title VII cases should apply in FHA cases.[25] As

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20. M. Duncan, National Association of Independent Insurers, THE FAIR HOUSING ACT & PROPERTY INSURANCE: THE CALL FOR CONGRESSIONAL ACTION (hereinafter, "THE FHA & PROPERTY INSURANCE") (October, 1995) 1-2.

21. *Id.; see also* JA 344, 386.

22. M. Duncan, THE FHA & PROPERTY INSURANCE 1.

23. *Id.*

24. JA 342-46.

25. There is a significant dispute as to whether the disparate impact theory applies to private entities in the FHA context. At least some courts have questioned whether plaintiffs should be allowed to establish FHA claims based solely on a showing of disparate impact absent discriminatory intent. *See, e.g., Brown v. Artery Org.*, 654 F. Supp. 1106, 1114-16 (D.D.C. 1987) (holding private landlords liable "for the racial effects of their housing conversions *irrespective of their purpose or intent* . . . would . . . be likely to halt in their tracks most, if not all, private efforts to upgrade deteriorated housing") (emphasis in original); *Village of*

HUD interprets this doctrine, neutral business practices such as the insurance industry's underwriting and pricing policies constitute illegal discrimination under the FHA when members of any protected class are adversely impacted unless the business can demonstrate both that there is a compelling need for the practice *and* that there is no alternative business practice it could use which would not have such an impact.[26] Under this disparate impact legal analysis, any risk-based pricing or underwriting factor that has greater impact in urban than suburban jurisdictions (e.g., age of property or

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Bellwood v. Dwivedi, 895 F.2d 1521, 1533 (7th Cir. 1990) ("[w]hether the [disparate impact] analogy works, especially after [*Wards Cove*] . . . is not a question we need decide"); *United States v. Weiss*, 847 F. Supp. 819, 826 (D. Nev. 1994) (" 'there is no indication that Congress had in mind the far reaching consequences of the [effects test] . . . on private landlords or developers' ") (citations omitted); *Boyd v. Lefrak Org.*, 509 F.2d 1110, 1113 (2d Cir. 1975) ("we will not impose an affirmative duty on the private landlord to accept low income tenants absent evidence that his motivation is racial rather than economic in origin"); *see also* American Bankers Association, FEDERAL LAW PROHIBITING LENDING DISCRIMINATION AND THE DEPARTMENT OF JUSTICE LENDING DISCRIMINATION ENFORCEMENT PROGRAM (1995) 55-57.

26. *See generally* Brief for the Secretary as Respondent, *HUD v. Mountain Side Mobil Estates*, 56 F. 3d 1243 (10th Cir. 1995) (No. 94-9509), in which HUD vigorously advocated the use of its flawed interpretation of the disparate impact theory in a housing discrimination action. It is without question that HUD intends to apply the disparate impact theory in the insurance context as well. *See, e.g., Hearing on Homeowners Insurance Discrimination Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 2d Sess. (1994) (statement of Roberta Achtenberg, Asst. Sec. for Fair Housing and Equal Opportunity) (May 11, 1994) at 6 ("[t]he standards to determine discrimination in [the insurance context]—as in all other covered areas—will be based on the principles of overt discrimination, disparate treatment, and *disparate impact*") (emphasis added); Discrimination in Property Insurance Under the Fair Housing Act; Advance Notice of Proposed Rulemaking: Notice of Extension of Public Comment Deadline, 59 Fed. Reg. 52104, 52105 (1994) (HUD requesting comments regarding "[insurance] [u]nderwriting practices that may discriminate due to . . . disparate impact").

environmental hazards) can be deemed racially discriminatory.[27] Similarly, practices adopted by insurers to limit fraudulent claims, such as refusing to provide replacement coverage where replacement cost far exceeds property value, often would be prohibited as discriminatory.[28]

Thus, so long as there remains uncertainty concerning the applicability of the FHA to the property insurance industry, insurers are left to confront an inherently inconsistent dual regulatory structure where the state regulatory authorities require that property insurance be priced to reflect risk, while HUD and private litigants attack underwriting and pricing standards based on demonstrable risk factors where they are perceived to adversely impact members of a protected class. The resulting dilemma has far-reaching implications for the property insurance industry. Where insurers abandon risk-based underwriting and pricing to address HUD's regulatory mandate, they must either expose themselves to increased economic risk or impose higher insurance costs on all property insurance consumers without regard to the risks being underwritten.[29]

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27. Concerns about coverage implications in urban areas resulting from risk-based pricing and underwriting have been addressed in the existing regulatory structure through implementation of "FAIR" plans (fair access to insurance requirements). Under typical FAIR plans, state-regulated insurers contribute to a mandatory pool of insurance for certain otherwise uninsurable properties and the risk of loss is distributed proportionally among all insurers. *See* M. Duncan, THE FHA & PROPERTY INSURANCE 15; *see also* JA 387-389, 449-51.

28. *See, e.g., Hearing on Homeowners Insurance Discrimination Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 2d Sess. (1994) (statement of Roberta Achtenberg, Asst. Sec. for Fair Housing and Equal Opportunity) (May 11, 1994) at 5.

29. As the Magistrate Judge in the district court in this action recognized, "[a]n insurer's underwriting standards provide the foundation for daily decisions whether to insure and at what rate to insure. Clearly, then, HUD's regulation *affects the primary business of insurers*. On the other hand, compliance with the HUD regulation, if it is invalid, could

Where an insurer declines to abandon the state-approved underwriting and pricing guidelines under which it now operates, it confronts a likelihood of protracted government investigations and/or class action litigation. This concern is not hypothetical. A number of property insurers currently are the target of HUD enforcement actions and are subject to the threat of multimillion dollar class action litigation premised on HUD's aggressive interpretation of the requirements the FHA places upon the insurance industry.[30] For example, it is publicly disclosed that HUD currently is pursuing investigations of major insurers under its purported FHA jurisdiction.[31] In addition, private litigants are pursuing actions, including class actions, against insurers based on HUD's interpretation of the reach of the FHA and the disparate impact legal theory.[32] Such actions can have

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cause insurers unnecessarily to bind themselves to cover risks they would otherwise have refused to accept." App. 41 (emphasis added).

30. HUD has established a special unit to handle property insurance issues arising under the FHA and held hearings throughout the country in connection with its initial intentions to promulgate regulations that would affect most aspects of the business of property and hazard insurance, including underwriting, sales and marketing policies and practices. *See Hearing on Homeowners Insurance Discrimination Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 2d Sess. (1994) (statement of Roberta Achtenberg, Asst. Sec. for Fair Housing and Equal Opportunity) (May 11, 1994) at 5; Discrimination in Property Insurance Under the Fair Housing Act; Advance Notice of Proposed Rulemaking, 59 Fed. Reg. 41995 (1994); *see also Hearing Before the House Comm. on the Judiciary*, 103d Cong., 2d Sess. (1994) (statement of Roberta Achtenberg, Asst. Sec. for Fair Housing and Equal Opportunity) (Sept. 28, 1994).

31. *Hearing on Homeowners Insurance Discrimination Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 2d Sess. (1994) (statement of Roberta Achtenberg, Asst. Sec. for Fair Housing and Equal Opportunity) (May 11, 1994) at 7-8.

32. Private individuals may file a civil action for relief after the occurrence or termination of an allegedly discriminatory housing practice. 42 U.S.C.A. § 3613(a)(1)(A) (West 1994). The current state of uncertainty concerning whether the FHA applies to insurance practices

devastating consequences for an insurer. Insurers must not only confront the public opprobrium of being labeled as racists based on the alleged impact of their use of objective risk factors in making pricing and coverage decisions, but are also exposed to the tremendous costs associated with defending such actions and to the threat of substantial liability under the FHA.[33]

In addition, such actions are being used to accomplish social engineering objectives that extend well beyond regulating the use of risk-based pricing and coverage standards by insurers to the regulation of nearly every aspect of the business of insurance, including marketing, sales, office placement and hiring practices. For example, insurance companies that want to resolve costly government investigations and private litigation have been compelled to institute affirmative marketing programs, which among other things set quotas regarding the type, size and frequency of advertisements to be placed in minority publications and aired on minority radio stations; mandate the distribution of special notices concerning insurance products to designated minority communities; set quotas regarding the number of sales agents placed in minority communities; and require insurers to compile and present to the government and private plaintiffs lists of minority groups with whom the insurers are then mandated to establish relationships. At least one insurer also has been required to subsidize interest rates and provide financing cost assistance for loans to low and moderate income African-Americans to purchase, repair and improve

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provides class action plaintiffs with a special incentive to engage in forum-shopping to bring actions against insurers in jurisdictions where the FHA has been held applicable to insurance practices.

33. The FHA permits the award of injunctive relief, compensatory and punitive damages and civil penalties, and assessment of litigation costs and attorney fees. *See* 42 U.S.C.A. § 3613(c) (West 1994) (relief available in private actions) and *id.* § 3614(d) (West 1994) (relief available in enforcement actions by Attorney General).

homes. *See generally* Consent Decree, *United States v. American Family Mut. Ins. Co.*, Civ. Act. No. 90-C-0759 (E.D. Wis. March 30, 1995).

For all these reasons, it is clear that continuing uncertainty concerning whether HUD has the legal authority to abrogate risk-based coverage practices has substantial and important implications for the thousands of businesses who comprise the insurance industry as well as the millions of homeowners who are consumers of property insurance products. It is therefore imperative that the Court accept certiorari in this matter.

CONCLUSION

For the foregoing reasons, as well as those presented by Petitioners, the *amicus curiae* request this Court to grant the petition for Writ of Certiorari.

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